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The international investment regime and local populations: are the weakest voices unheard?

Nicolás M. Perrone*

Abstract

The laws that govern the allocation and use of resources can not only annihilate individual property rights but also destroy community. Locals' participation in decisions about property is therefore vital. This article argues that local populations currently have a limited voice in foreign investment decisions, and that the international investment regime contributes to this unfair result. The interpretation of investment tribunals, according to international investment treaties, relies on reasoning that promotes the calculability of investments and the trust of foreign investors above all. Often, this interpretation threatens other property rights and community values. This article illustrates these dangers using the cases of *Aguas del Tunari v. Bolivia* and *Chevron v. Ecuador*. It concludes by suggesting that international law can be part of a solution to these problems; but for that, we need to give local populations a meaningful role in foreign investment governance.

Keywords: International investment law; Investment arbitration; Human rights; Local participation; Foreign investment

Introduction

Foreign investment decisions have important implications for host states and local populations. The right decisions may promote economic development; the wrong decisions may have devastating social and environmental consequences. Currently, international investment law literature looks at foreign investment from the perspective of the state, emphasising its right to regulate and its ability to curb negative consequences of foreign investment.¹

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¹ This perspective is dominant in the global administrative law literature. See Stephan Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22(3) *The European Journal of International Law* 875, 899–901; M. Sornarajah, Columbia Centre on Sustainable Investment, *Starting Anew in International Investment Law* (2012) Columbia FDI Perspectives 74, online: <http://ccsi.columbia.edu/files/2014/01/FDI_74.pdf>.

From a holistic perspective, it can be said that this kind of inquiry shows two limitations. First, it mainly focuses on the situation *after* the establishment of the foreign investment, paying less attention to how foreign investors may have begun the project against the will and aspirations of host states and, particularly, of local populations. Second, it removes local populations from any meaningful role in the analysis both *before* and *after* the establishment of the foreign investment.

The objective of this article is to focus precisely on these two blind spots in the literature: the period before the establishment of the investments, and the role of local populations in foreign investment relations. A holistic view has never been at the forefront of the foreign investment debate. During the 1960s and 1970s, part of the discussion focused on the regulation of multinational corporations and the need to pay more attention to divergent national interests.² But in the last thirty years, these issues have lost importance because of neoliberal development policies and the complexities of international investment law.

There are good reasons to be suspicious of the resulting narrow view, as it affects the bargaining power of foreign investors, host states and local populations differently. In his seminal contribution on bargaining in the shadow of the law, Robert Hale did not have a particular interest in foreign investment, but he ended referring to ‘the interests of vast numbers of persons’ in natural resources.³ He highlighted that:

[I]t makes a great difference to many who live elsewhere how the concessions are apportioned, whether the resources are exploited at all or are locked up, how they shall be rationed (in case the supply, at the price charged, falls short of the demand), and what government shall control the disposition of any revenues derived from their taxation.⁴

In his analysis, Hale underlined some fundamental problems we still see today in the field of foreign investment. He noted that foreign investors invest large amounts of money in places where they have no representation in the local government. Already in the 1920s, for this reason, these corporations were relying on their home states to put pressure on local governments. This attitude, for Hale, contained ‘the most fertile seeds of modern warfare’.⁵ At the same time, Hale also highlighted a

² See United Nations, *Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and International Relations* (1974).

³ In this article, Hale is interested in the bargaining between employers and labour. Robert Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ (1923) 38:3 *Political Science Quarterly* 470, 493.

⁴ *Ibid.*

⁵ *Ibid.*, 494.

holistic view of the foreign investment problem. For him, foreign investment evoked questions about ‘democracy, representative government, international economic conflicts and their adjustments’.⁶

Today, Hale’s observations spark two different reflections. On the one hand, the international community managed to avoid foreign investment wars. The international investment regime (IIR) probably deserves some recognition for this as it encourages the peaceful resolution of foreign investment disputes through international arbitration.⁷ Today, this regime consists of more than 3,000 treaties for the promotion and protection of foreign investment.⁸ The main objective of the IIR is to protect foreign investment from the abuse and arbitrariness of host states. The preambles and clauses of these treaties focus essentially on the treatment host states grant to foreign investors after establishment. Any foreign investor protected by a treaty has the right to launch international arbitration against the host state claiming unfair discrimination, expropriation without compensation, or the violation of the fair and equitable standard of treatment (FET).⁹

On the other hand, most investment treaties and investment law literature have avoided talking about local participation, representative government and foreign investor rights.¹⁰ The protection of foreign investor rights very often pays little attention to the questions that matter most for local populations, such as whether a target resource should be exploited or how the benefits should be distributed. Investment tribunals instead assume the task of protecting foreign investor rights, overlooking the events leading to the investment and the resulting scope of these rights. According to most investment awards and a large part of the literature, the crucial task of the IIR is reviewing state behaviour after the establishment of the investment, and drawing the correct line between foreign investor rights and the state’s regulatory authority.¹¹

⁶ *Ibid.*

⁷ According to Broches, one of the main promoters of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID), this regime would help to ‘remove investment disputes from the intergovernmental political sphere’. See Aaron Broches, ‘Settlement of Investment Disputes’ in Aaron Broches (ed), *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers, 1995) 161–178, 163.

⁸ According to the most recent United Nations Conference on Trade and Development (UNCTAD) data, the number of investment treaties has reached 3268 as of early 2015. See UNCTAD, *Recent Trends in IIAs and ISDS* (February 2015), UNCTAD/WEB/DIAE/PCB/2015/1, online: <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf>.

⁹ Jeswald Salacuse, ‘The Emerging Global Regime for Investment’ (2010) 51 *Harvard International Law Journal* 429.

¹⁰ A relevant exception is the work of Schneiderman, who focuses on the constitutional model promoted by the IIR. See David Schneiderman, *Constitutionalizing Economic Globalization. Investment Rules and Democracy’s Promise* (Cambridge University Press, 2008).

¹¹ The tribunal in *Saluka*, for instance, noted that ‘international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered ‘permissible’ and ‘commonly accepted as falling within the police or regulatory power of States and, thus, noncompensable’. See *Saluka v. the Czech Republic*, UNCITRAL, Partial Award (17 March 2006) [263].

The power of investment tribunals to review host state measures is necessary, according to some of this literature, because foreign investors have no representation in local governments.¹² As this article will illustrate, however, foreign investment relations show that foreign investors often have easy access to host governments before and after the establishment of a project.¹³ Things could go wrong, obviously, and access does not mean that foreign investors always get what they want. But the reality seems to be that host states have a high incentive to treat foreign investors as well as possible. Many governments around the world depend on foreign investment to achieve economic growth under a neoliberal paradigm. The reputation built by their initial investment treaties then becomes a fundamental asset for attracting further foreign investment.

If attracting foreign investment is a main goal of contemporary states, it is worth asking whether foreign investors' concerns about mistreatment are overstated or, perhaps, whether the IIR protects foreign investors from actors besides host states. The main threat to foreign investments, in fact, may lie in the competing interests of local populations. The foreign investor rights that facilitate the current economic transformation—ie the emergence of a transnational capitalist class¹⁴—may share something very important with the property rights that made possible the domestic capitalist revolutions of the 19th century. They essentially protect corporate interests from the population (not from governments).¹⁵ Host governments sometimes react against foreign investment after establishment. But, in most cases, these reactions are due to previous mobilisations of local populations. Host governments rely on foreign investment for growth, but need to maintain internal order and win elections.

The caseload of foreign investment disputes confirms these dynamics. In this article, I will illustrate my argument using two disputes: *Aguas del Tunari v. Bolivia* and *Chevron v. Ecuador*.¹⁶ The

¹² See Thomas Wälde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-Actively, the quality of Arms' (2010) 26:1 *Arbitration International* 3; *Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award (28 March 2011) [57].

¹³ Robert Reich, 'Who Is Them?' (1991) 69:2 *Harvard Business Review* 77; Raymond Saner, Lichia Yiu and Mikael Søndergaard, 'Business Diplomacy Management: A Core Competency for Global Companies' (2000) 14:1 *Academy of Management Executive* 80.

¹⁴ Bhupinder Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15:1 *European Journal of International Law* 1.

¹⁵ See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* ([1957] 2001) 233. Adam Smith argued a similar point. See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* ([1776] 1904) V.1.55.

¹⁶ *Aguas del Tunari v. Republic of Bolivia*, ICSID Case No ARB/02/3; *Chevron v. Ecuador*, UNCITRAL, PCA Case No. 2009–23. These two disputes illustrate a common dynamic in investment arbitrations related to human rights and the environment. Another example is *Bilcon v. Canada*, UNCITRAL, PCA Case No. 2009–04, Award (15 March 2015). In *Bilcon*, the Canadian government decided not to authorise a mining project because of popular outcry and the results of an environmental impact assessment. Consider also the domestic litigation against Coca-Cola in the Kerala State, India, where the unsustainable use of underground water by Coca-Cola resulted in popular mobilisation and litigation in Kerala. See *Perumatty Grama Panchayat v. State of Kerala*, 16 December, 2003.

case of *Aguas del Tunari* involved the privatisation of the public water system in the city of Cochabamba, Bolivia. In an opaque process with only one bidder, Bolivia awarded this concession to the multinational Bechtel without consultation with the local population. A few weeks later, this foreign investor increased the tariffs substantially and restricted alternative access to water supplies. The population of Cochabamba replied with a large public protest, asking for the termination of the concession. This first led to a brutal repression by the Bolivian authorities, and later to Bolivia's unilateral termination of the concession as a result of the unprecedented social mobilisation. Bechtel responded with an arbitration before an investment tribunal, which it later dropped due to international pressure.¹⁷

The case of Chevron is one of the latest episodes in the global litigation that resulted from the environmental disaster in Lago Agrio, Ecuador. Texaco's operations in the area began in 1967 and ended in 1992. By the end of the concession, all the parties involved had to acknowledge the large environmental disaster in the Lago Agrio. With no active participation by the local population, however, Texaco agreed with Ecuador to carry out a limited remediation. The program concluded in 1998, and Ecuador absolved Texaco from any further responsibility. Texaco was later acquired by Chevron. The local population was never satisfied with the agreed remediation and began litigation first in the United States and later in Ecuador, where they were finally awarded 8.5 billion dollars in damages.¹⁸ The government of Ecuador embraced the cause of the local population only after this decision, and has since defended the legitimacy of the case against Chevron. The foreign investor has struck back by claiming before an investment tribunal that the remediation agreement precluded any further litigation, and that the decision on damages is the outcome of corruption. This arbitration is still pending.

The events leading to these disputes indicate that the IIR is more than a regime protecting foreign investment from host states. It also constitutes a site where foreign investors and local populations struggle over local resources. From this holistic perspective, the IIR is about more than foreign investor rights and state regulatory power. What is at stake also includes the right to participation, local property rights, and community values.¹⁹ These relational implications suggest that property law and property theory can be an appropriate framework with which to analyse the IIR. Recently, Sprankling has argued that the IIR constitutes part of an emerging international law of

¹⁷ Sarah Anderson and Sara Grusky, Food and Water Watch and the Institute for Policy Studies, *Challenging Corporate Investor Rule* (2007), online: <www.ips-dc.org/wp-content/uploads/2009/05/challenging-Corporate-Investor-Rule-final.pdf> 18.

¹⁸ Judith Kimerling, 'Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevron Texaco, and Aguinda v. Texaco' (2006) 38 *New York University Journal of International Law and Politics* 413.

¹⁹ This disregard for local populations, as Rajagopal argues, is a systemic problem of international law. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press, 2003).

property.²⁰ More importantly, progressive property scholars in the United States have been focusing on the relational importance of property, ie the sociology of property, highlighting the relevance of democracy and participation for a legitimate property system.²¹

Relying on this property literature, this article argues that local populations have limited or no participation in foreign investment decisions that affect their rights and values, and that the IIR contributes to this unfair result. Foreign investors establish themselves in host countries with clear expectations regarding the use of resources, and these expectations often clash with the aspirations of local populations. When local populations do not have the opportunity to participate in foreign investment decisions, foreign investors may end up establishing projects that ignore local aspirations. Later, this may bring about local political mobilisation, but host states probably have few options with which to respond to these political demands that do not require paying compensation to foreign investors. In this way, the outcome is often a situation where local populations have to adjust to the expectations of foreign investors.

This article is organised as follows. The first section examines the close connection between property and the fundamental values of a population. Participation can be said to be one of these values, in particular the right to participate in decisions that can affect local property rights and aspirations. This section ends by suggesting the negative implications of international investment rules on local participation. The second section focuses on the IIR as a regime for the control of local resources. It describes the operation of this regime and how it can lead to negative consequences unknown to local populations. The third section explores how investment arbitrators favour the position of foreign investors. It describes the doctrine of legitimate expectations, highlighting that this reliance-based reasoning hinders local participation in foreign investment decisions and contributes to unfair results for local populations (like the ones in Cochabamba and Lago Agrio). The fourth section contrasts foreign investor rights with a democratic view of property. It explains that investment arbitrators emphasise foreign investor substantive expectations, so it is the locality that needs to adapt to the rationality of the business project and not otherwise. To remedy this unfair result, this section analyses the basis for a meaningful participation of local populations.

This article concludes by calling into question the foundations of the IIR. While supporters have justified the need for this regime using foreign investors' inability to vote or participate in the political life of host countries, a look at foreign investment relations indicates that the ones excluded from participation in fundamental investment decisions are rather local populations. As it currently stands, the IIR probably facilitates foreign investment decisions, but at the high cost of limiting local participation and aspirations. This article ends by suggesting that international law can still be part of

²⁰ John Sprankling, *The International Law of Property* (Oxford University Press, 2014).

²¹ See Section 1 *infra*.

the solution, and that thinking differently about the international governance of foreign investment could be an important step towards a more legitimate use of local resources.

1. Property, community values and participation

A thriving and relatively new strand of property scholarship has shifted the focus of this field dramatically, moving from ‘legal relations between individuals with respect to things’ to a social and holistic view of property relations. For progressive property scholars, property represents a foundation for social relations.²² It incorporates values about justice, ethics and fairness as well as principles of economic organisation and knowledge.²³ In this account, it can be said that property shares a relation of ‘circular causation’ with fundamental social values.²⁴ It incorporates these values into the operation of legal techniques for the control of resources, but it also shapes those values according to the socially accepted purposes of resources (and the means to achieve these purposes).²⁵ In a recent work, for instance, Singer describes the intimate connection between property and democratic values, showing how equality and participation are fundamental principles for some property institutions.²⁶

Property, in this way, is not only a reflection of values, it is also a means to maintain and reproduce social values and practices.²⁷ Seen from this perspective, the traditional legal notion of property as an *in rem* right covers only a fraction of this institution. It overlooks the social importance of property. In political philosophy, there are many and divergent references to property in this sense. Locke and Marx, for instance, were not referring to individual legal relations when talking about property.²⁸ They were interested instead in the social values that property creates and maintains: the values that motivate and justify individual, state and communal behaviour. This relationship between property and values is of fundamental importance for progressive property scholars. In their view, property can create, maintain or destroy community.²⁹

²² Gregory Alexander, Eduardo Peñalver, Joseph Singer and Laura Underkuffler, ‘A Statement of Progressive Property’ (2009) 94 *Cornell Law Review* 743.

²³ Amnon Lehari, ‘The Global Law of the Land’ (2010) 81 *University Of Colorado Law Review* 425, 469.

²⁴ See Duncan Kennedy, ‘The Stakes of Law, or Hale and Foucault!’ (1991) 15 *Legal Studies Forum* 327, 334–5.

²⁵ See Annelise Riles, ‘Property as Legal Knowledge: Means and Ends’ (2004) 10 *The Journal of the Royal Anthropological Institute* 775.

²⁶ Joseph Singer, ‘Property as the Law of Democracy’ (2014) 63 *Duke Law Journal* 1287, 1304.

²⁷ Carol Rose, ‘Property as the Keystone Right?’ (1996) 71 *Notre Dame Law Review* 329, 329, 362–5.

²⁸ C. B. Macpherson (ed), *Property, Mainstream and Critical Positions* (University of Toronto Press, Scholarly Publishing Division, 2nd edn 1978).

²⁹ Amnon Lehari, ‘How Property Can Create, Maintain, or Destroy Community’ (2009) 10:1 *Theoretical Inquiries in Law* 43. See also Gregory Alexander, ‘Intergenerational Communities’ (2014) 8:1 *Law & Ethics of Human Rights* 21.

Unsurprisingly, a historical approach to property shows that the values that property articulates are plural and changing.³⁰ Property rights and duties can privilege values such as propriety, autonomy, wealth maximisation or democracy. Notions of property that emphasise propriety represent sources of rights as well as obligations for property holders. This, as Rose explains, is illustrated by the phrase *noblesse oblige*.³¹ The importance of this view weakened substantially as a result of liberal thinking, which finds in property a castle built to defend individual freedom. This notion of property as one's castle remains somewhat influential, but its importance has decreased because of the rise of wealth maximisation as the fundamental purpose for property.³² Starting with the Scottish Enlightenment, the justification of property institutions has been dominated by economic ideas, which aim to motivate individuals to act according to their own self-interest.³³

Property institutions articulate values that can coexist, clash or both. The maximisation of wealth very often clashes with a democratic view of property: the most paradigmatic example of this is the present material inequality that affects the entire world. The problem of distribution is presently very serious. At the same time, the caveat that we need something first in order to distribute remains valid. It is not easy to envision a growing democratic society without economic growth.³⁴

Other property values, in addition, are not universal aspirations—like wealth maximisation or democracy—but rather represent the particular preferences of each local population. Property scholars recognise the local character of property institutions, accepting that the value conflict in property can adopt a universal versus local structure.³⁵ This kind of conflict has become more and more common with the expansion of multinational corporations and a transnational capitalist class.³⁶ Foreign investors establish in host countries with expectations about property that not always have a strong connection with local values. For many local populations, decisions about the allocation and distribution of entitlements should factor in more than the 'maximum effective use of its economic resources'.³⁷

³⁰ Macpherson (n 28) 1–14.

³¹ Carol Rose, *Property and Persuasion* (Westview Press, 1994) 62–4.

³² *Ibid*, 1–8; Joseph Singer, 'The Ownership Society and the Takings of Property: Castles, Investments, and Just Obligations' (2006) 30 *Harvard Environmental Law Review* 309, 314–6.

³³ For a detailed analysis of this influence in the United States, see Gregory Alexander, *Commodity & Propriety: Lessons for American Takings Jurisprudence* (1997) 60–6.

³⁴ Rose, (n 31) 3–4.

³⁵ Lehari (n 23) 457–9, 468–9; Hanoch Dagan, *Property, Values and Institutions* (Oxford University Press, 2011) 44.

³⁶ See Chimni (n 14).

³⁷ Contrast *El Paso v. Argentina*, ICSID Case no ARB/03/15, Award (31 October 2011) [369] with Rajagopal (n 19) 139, 169, 293.

Looking at property from a democratic perspective highlights this plurality of voices and underscores the need to resolve conflicts according to the principles of equality and participation.³⁸ Democracy is a universal aspiration that nonetheless can serve to protect community values—at least to a certain extent. It can be said that democratic property requires, among other things, property entitlements that respect individual human rights, such as the basic right to water. More essential for community values, however, is the idea that democratic property demands a respect for equality and participation.³⁹ This can relate to a more egalitarian distribution of resources as well as a more equal participation of different people and values in the process of property creation and distribution. While there is no human right to an egalitarian distribution, many human rights instruments explicitly incorporate the right to participate in government and in decisions related to the use of resources. For instance, consider the American Convention of Human Rights (Article 23), the International Covenant on Civil and Political Rights (Article 25), and Convention 169 of the International Labour Organisation.⁴⁰

The importance of participation in property relations is highlighted at domestic and international levels. Fischel asserts that the victims of unfair property interventions in the United States are very often those who had no opportunity to participate in the political process that ultimately led to arbitrary or abusive decisions.⁴¹ This argument—as mentioned above—has been used to justify the international protection of foreign investors. Investment law scholarship readily accepts that an inability to participate in the political process leaves a group's interests undefended, but ironically hesitates to apply this logic to participation by local populations. Formal participation, in this regard, should not be the only criterion used to identify vulnerable groups. Large multinational corporations amply compensate for their lack of political rights with substantial economic power and other forms of participation.⁴² Limiting the idea of participation to formal political participation, in other words, can only be misleading.⁴³

Either through political, administrative or other means of participation, a robust idea of property requires everybody whose rights or community values may be impaired to have an equal voice in decisions about resources.⁴⁴ Historically, a fundamental principle of democracy has been that

³⁸ Singer (n 26); Anna di Robilant, 'Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law' (2014) 62:2 *American Journal of Comparative Law* 367.

³⁹ Singer (n 26); Di Robilant (n 38) 305.

⁴⁰ For an analysis of free, prior and informed consent, see Section 4.

⁴¹ William Fischel, *Regulatory Takings: Law, Economics, and Politics* (Harvard University Press, 1995) 107.

⁴² See Reich (n 13).

⁴³ Property scholars have also made this argument. See William Treanor, 'The Original Understanding of the Takings Clause and the Political Process,' (1995) 95 *Columbia Law Review* 782, 863-4; Daniel Farber, 'Economic analysis and just compensation,' (1992) 12:2 *International Review of Law and Economics* 125, 130.

⁴⁴ Singer (n 26) 1326. This is consistent with a procedural view of the rule of law and a deliberative understanding of democracy. See Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge

decisions about property need to be taken by parliament or congress, where allegedly all people are represented. Equality of representation emerged, in this sense, to the detriment of individual freedom.⁴⁵ A contemporary view of democracy, however, suggests that this safeguard for community values—if it ever worked—may not be working anymore. Rosanvallon shows in his work that representative democracy suffers from a series of limitations; in particular, he notes that the loyalty between people and their representatives is partially broken. A traditional approach to political participation is therefore not useful anymore. Instead, Rosanvallon claims that democracy should lie today in new formal and informal channels that would allow equal participation in crucial decisions for individuals and the population.⁴⁶

But the international sphere, at least so far, has not been a catalyst for the emergence of new participatory channels. Perhaps, in fact, it has been quite the opposite (as Rajagopal suggests⁴⁷). During the decolonisation period, newly independent countries relied on self-determination and sovereignty to decide on their own social institutions.⁴⁸ This transition required countries, as seen above, to set their own property systems. But the limitations imposed on self-determination at the international level were severe. International investment rules were relevant in hindering host state sovereignty as a means to protect Western interests.⁴⁹ Foreign investor rights prevailed over national aspirations, justified by the need to promote property rights protection and domestic economic development.⁵⁰

Today, things are not very different. The persistent focus on foreign investment protection silences the voices and interests of local populations in the allocation and use of key local resources. This can lead to great evils, especially in the case of natural resources, that are not always tolerable. The water privatisation in Cochabamba did not take into account local voices and aspirations. It did not consider the likely opposition to an increase of the water tariffs and the prohibition of traditional ways of collecting water from rivers and rainfall. Takings these expectations seriously, however, could have avoided a social dispute that can be described with no exaggeration as a short-lived civil war.⁵¹ In the case of the dispute between Ecuador and Chevron/Texaco, the struggle over local

University Press, 2012) 107; Jürgen Habermas, Ciaran Cronin (ed) and Pablo De Greiff (ed), *The Inclusion of the Other: Studies in Political Theory* (The MIT Press, 1998) 129–55.

⁴⁵ The tension between equality and freedom is a constant in liberal democracies. See Pierre Rosanvallon, *La contre-démocratie: la politique à l'âge de la défiance* (Groupe Seuil, 2006) 10.

⁴⁶ *Ibid.*

⁴⁷ Rajagopal (n 19).

⁴⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 196–8.

⁴⁹ *Ibid.*, 223–44.

⁵⁰ *Ibid.*, 207–11. See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge University Press, 2011) 95–171.

⁵¹ Anderson and Grusky (n 17) 18; Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Simon and Schuster, 2004) 166.

resources did not end with the termination of the concession. The environmental disaster in the Lago Agrio forced Chevron/Texaco to enter into a remediation agreement with Ecuador. This agreement was negotiated and implemented without the active and full participation of the local population. Twenty years later, the people who suffered the direct consequences of this disaster are still demanding fair reparation.⁵²

2. Foreign investor rights, local resources and local consequences

The IIR is a legal regime that serves to strengthen foreign investor control over local resources, particularly key natural resources. Some contributions have underscored the property-focused nature of the IIR, when looking at the applicable law in investment arbitration or the types of assets that can qualify as an investment.⁵³ But the relation between property law and international investment law exceeds these questions. The IIR constitutes a set of ground rules for the control of host resources.⁵⁴ This does not turn this regime into a property or contract system, but foreign investment rules do intervene in the domestic legal order, constructing foreign investor rights as a special category of entitlements vis-à-vis competing local interests. Investment arbitrators have the task of specifying the content of foreign investor rights because—like other property and contractual rights—they are incomplete.⁵⁵ And, as they do this, they are also reshaping any competing entitlement since economic rights are eminently relational.

According to the IIR, the ground rules for the control of host resources operate under a two-level structure.⁵⁶ The first level is made of the treaties signed by states. These treaties serve the function of constitutional property clauses, which in most countries protect property and contractual rights.⁵⁷ The second level of this regime is made of the specific entitlements that foreign investors acquire when establishing an investment. These can be standardised property rights to land, but most modern foreign investments are made up of a complex bundle of negotiated property and contractual

⁵² Kimerling (n 18).

⁵³ Zachary Douglas, *International Investment Claims* (Cambridge University Press, 2009) 52, 161.

⁵⁴ Nicolás Perrone, 'The International Investment Regime and Foreign Investors' Rights: Another View of a Popular Story' (2014) 11:3 *Manchester Journal of International Economic Law* 397. Lehavi and Licht agree with this proposition as they recognize 'the complicated relationship between overlapping layers of legal ordering and the complex construction of property systems'. See Amnon Lehavi and Amir Licht, 'BITs and Pieces of Property' (2011) 36 *Yale Journal of International Law* 115, 160–1.

⁵⁵ Christian Barrère, 'Judicial System and Property Rights' in Enrico Colombatto (ed), *The Elgar Companion to the Economics of Property Rights* (Edward Elgar Publishing, 2006) 129–153, 151; Gary Libecap, 'Transactions-Costs Approach to the Analysis of Property Rights' in Eric Brousseau and Jean-Michel Glachant (eds), *The Economics of Contracts—Theories and Applications* (Cambridge University Press, 2002) 142.

⁵⁶ See Ravi Ramamurti, 'The Obsolescing 'Bargaining Model'? MNC-Host Developing Country Relations Revisited' (2001) 32:1 *Journal of International Business Studies* 23, 29.

⁵⁷ Perrone (n 54) 417–9.

rights.⁵⁸ The cases of Aguas del Tunari and Chevron are good examples of this. The foreign investor in Aguas del Tunari acquired a concession containing a long list of rights, including an entitlement to raise the water tariffs. The foreign investment of Chevron in Ecuador was the outcome of a joint venture that gave this investor a certain share of control over the project in Lago Agrio. Later, Chevron acquired, through a specific agreement, a privilege to pay compensation for only a very small fraction of the resulting environmental damage.

What interests me here are the specific rights that foreign investors acquire when establishing a project (the second level of the IIR). Foreign investors often do not acquire a standardised bundle of rights, but rather negotiate with governments to set the specific scope of control that suits the foreign investment.⁵⁹ This has the advantage of facilitating sophisticated business projects that would be impossible to organize with traditional property rights. The disadvantage is that the elements that characterise standardised property rights are lost in favour of laying down adequate rules for the particular economic undertakings.⁶⁰ Consequently, it is difficult for local populations to know in advance the scope of control acquired by specific foreign investors. The situation is very different from the new neighbour who buys the next house and acquires a predictable bundle of rights. To understand the rights assigned to foreign investors, the local population needs to know the details of the investment agreement and the standards of the applicable treaty, as well as to understand the interpretative techniques that investment arbitrators will likely use to specify the scope of foreign investor rights.⁶¹ The effort needed to understand each new investor's rights creates an asymmetry of information that limits the ability of local populations to realise the implications of any foreign investment—in particular, any threat to community values.

Consider how this asymmetry manifested in the *Aguas del Tunari* case. Like Finnegan explains, '[i]n the World Bank's view, [Cochabamba] was a city that was crying out for water privatisation'.⁶² However, the investment project of Aguas del Tunari also implied sudden tariff hikes and a *de facto* limitation on any alternative sources of drinkable water. There is no reason to assume that the local population was informed of these new obligations. And this in a context where research began questioning the success of water privatisations.⁶³

⁵⁸ David Kennedy, 'Some Caution about Property Rights as a Recipe for Economic Development' (2011) 1 *Accounting, Economics, and Law* 1, 31–2.

⁵⁹ See Thomas Merrill and Henry Smith, 'The Property/Contract Interface' (2001) 101 *Columbia Law Review* 773, 788. See also Peer Zumbansen, 'The Law of Society: Governance through Contract' (2007) 14 *Indiana Journal of Global Legal Studies* 191.

⁶⁰ See Merrill and Smith (n 59) 778–9.

⁶¹ See David Kennedy (n 58) 13.

⁶² William Finnegan, 'Letter from Bolivia,' *The New Yorker*, 8 April 2002. See World Bank, *Bolivia - Major Cities Water and Sewerage Rehabilitation Project* (1998).

⁶³ See Peter Robbins, 'Transnational Corporations and the Discourse of Water Privatization' (2003) 15:8 *Journal of International Development* 1073.

But there is more at stake here than economic gains (and losses). The private management of a public utility—like water and sanitation—operates based on a business rationale. This means that values like solidarity and respect for traditional means of obtaining water are overshadowed by principles such as efficiency and profitability. Something similar occurs with the production of natural resources, which normally have large social implications. The experience of the Lago Agrio shows that local lifestyles suffer not only during the period of production but afterwards as well.

In short, although the effects of many foreign investment projects are long-lasting, the local population may only realise the full extent of these implications when they have already happened. The challenge of the IIR, then, is not simply to protect foreign investment. It is to shape an idea of foreign investor rights that appeal to the interests and aspirations of foreign investors, host states and local populations. The protection of foreign investor rights requires a good justification for any negative consequences of foreign investment.

3. Investment tribunals' interpretation and local aspirations

The IIR is based on the premise that foreign investors and host states reach an agreement that leads to the establishment of a project. This regime aims to protect the micro-rationality of each of these agreements.⁶⁴ The obsolescing bargain and the hold-up model —two dominant justifications for the IIR—justify investment protection because of the possibility that host states renege on their promises after the establishment of the projects.⁶⁵ Reisman puts this clearly when he explains that ‘it is the maintenance of the belief in all relevant parties that the legitimate expectations of qualified investors based on legal commitments by states are meaningful and will be enforced. No more!’⁶⁶ The reality is more complex, however, because foreign investor rights are relational and are not the product of a comprehensive decision on every possible issue. As explained above, foreign investments comprise a number of property and contractual rights, both tangible and intangible: ie a collection of relatively incomplete entitlements in potential conflict with other rights and values.

⁶⁴ See DiMascio, Nicholas and Joost Pauwelyn, ‘Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102 *The American Journal of International Law* 48, 54–6; Moshe Hirsch, ‘Investment Tribunals and Human Rights Treaties: A Sociological Perspective’, in Freya Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge University Press, 2013) 85–99; *Glamis v United States*, UNCITRAL (NAFTA), Award, (8 June 2009) [1]–[7]; *Minnotte & Lewis v Poland*, ICSID Case No ARB (AF)/10/1, Award, (May 16 2014) [155].

⁶⁵ Salacuse (n 9) 450–1; Witold Henisz, ‘The Institutional Environment for Multinational Investment’ (2000) 16:2 *Journal of Law, Economics & Organization* 334.

⁶⁶ Michael Reisman, ‘“Case Specific Mandates” Versus “Systemic Implications”: How Should Investment Tribunals Decide? - The Freshfields Arbitration Lecture’ (2013) 29:2 *Arbitration International* 131, 151. See also McGill Faculty of Law ‘An open letter about investor-state dispute settlement’ (10 April 2015), online: <www.mcgill.ca/fortier-chair/isds-open-letter>.

But the interpretative technique that investment arbitrators apply to specify foreign investor rights is based on the assumption that there is a comprehensive investment decision available somewhere. According to the fair and equitable standard, investment arbitrators rely on the doctrine of legitimate expectations to look for facts that can serve as bases for foreign investor rights: ie evidence of host state representations or promises.⁶⁷ The doctrine of legitimate expectations uses a reliance-based reasoning to focus on the dealings that immediately predate the establishment of a project. This approach is evidenced by the role that the moment of establishment and the principle of good faith play in most investment awards.⁶⁸

The key of reliance is not the will of the parties and the scope of their commitments, but rather the trust of the counterparty on explicit, implicit and tacit representations made on the occasion of the decision to invest.⁶⁹ In a promissory estoppel or a contract law scenario, reliance would normally work both ways, meaning that not only foreign investors but also host states and local populations could benefit from this reasoning. But in the IIR, reliance only favours foreign investors, probably because the IIR embodies a substantive rule of law for foreign investors only.⁷⁰ This means that the specification of foreign investor rights, ie foreign investor expectations, focuses on the position and needs of foreign investors to establish and carry out their investments. Foreign investors require that host state representations—even those emerging from the general regulatory framework—have some legal value in case the host state or the local population decide to change the law.⁷¹

Reliance fulfils a fundamental role as it serves to impose obligations on host states when no contract was signed,⁷² when the government had no intention to bind itself,⁷³ or when the bargain does

⁶⁷ A doctrinal analysis of legitimate expectations can be found in Michele Potestà, ‘Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept’ (2013) 28 *ICSID Review* 88. The relevance of facts for the FET standard has been noted by several tribunals. See *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award, (7 December 2011) [318]; *Merrill v Canada*, UNCITRAL (NAFTA), ICSID Administered Case, Award (31 March 2010) [210]; *Joseph Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) [284]; *Siag and Vecchi v. Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) [450].

⁶⁸ Christoph Schreuer and Ursula Kriebaum, ‘At What Time Must Legitimate Expectations Exist?’ in Jacques Werner and Arif Ali (eds), *A Liber Amicorum: Thomas Wälde* (Cameron May Publishing, 2009) 265–269; *Waguih Elie George Siag v Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) [450]; *Total v Argentina*, ICSID Case No ARB/04/01, Decision on Liability (27 December 2010) [128, 159]; *El Paso v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) [348].

⁶⁹ In contract and administrative law, legitimate expectations are justified by the trust or position of the promisee or promisees. See Andrew Gold, ‘A Property Theory of Contract’ (2009) 103:1 *Northwestern University Law Review* 1, 19–24; Paul Reynolds, ‘Legitimate Expectations and the Protection of Trust in Public Officials’ (2011) *Public Law* 330. Investment tribunals note that legitimate expectations can arise from explicit, implicit and even tacit representations. See *Total v Argentina*, ICSID Case No ARB/04/01, Decision on Liability (27 December 2010) [120]; *Frontier Petroleum v the Czech Republic*, UNCITRAL, Award (12 November 2010) [285], *Parkerings-Compagniet v Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) [331]; *Grand River v United States*, UNCITRAL (NAFTA), Award (12 January 2011) [141].

⁷⁰ Waldron (n 44).

⁷¹ *Suez and others v Argentina*, ICSID Case No ARB/03/17, Decision on Liability, (30 July 2010) [222].

⁷² See Randy Barnett, ‘The Death of Reliance’ (1996) 46 *Journal of Legal Education* 518, 524.

not comply with the legal requirements for its validity, ie *ultra vires* acts.⁷⁴ An agreement over an investment project, for instance, may require more than signing a contract; it may include a review of the agreement, the issuance of permits or licences, or the resolution of legal challenges against the decision.⁷⁵ But foreign investors cannot be left to depend upon subtleties and niceties of host states and local populations.⁷⁶ Following this rationale, many investment tribunals have found that foreign investors may acquire entitlements notwithstanding the rest of the administrative or judicial procedure.⁷⁷ Host state representations or promises can be enough; they need to be somewhat specific but not necessarily explicit.⁷⁸

This approach to reliance is justified by the need to promote economic development. Some investment arbitrators argue that it would be unfair not to protect foreign investor expectations. But, ultimately, the main argument is that the disappointment of foreign investor expectations would lead to mistrust between foreign investors and host states, reducing foreign investment flows. Promoting calculability, in this way, is necessary to encourage economic development.

This calculability, however, comes with a cost. While specifying foreign investor entitlements through the legitimate expectations doctrine, tribunals overlook the rights and aspirations of local populations: where does the trust of local communities in their public institutions enter into the equation? How does the international community expect local populations to participate in the negotiation process and oppose the formation of foreign investor legitimate expectations if these expectations can emerge from state representations alone? In the case of Aguas del Tunari, for instance, the local population was following the privatisation process very closely, demanding more information. Not only was this information never provided, but the water concession was finally granted through direct and opaque negotiations.⁷⁹ It is arguable that the social chaos that followed in Cochabamba could have been prevented if the creation of foreign investor rights had been done according to democratic principles.

⁷³ Gold (n 69) 22–3.

⁷⁴ Michael Reisman and Mahnoush Arsanjani, ‘The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes’ (2004) 19:2 *ICSID Review – Foreign Investment Law Journal* 328, 343; *Pacific Properties v Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992) [82]–[83].

⁷⁵ UNCTAD, *State Contracts* (United Nations Publications, 2004) 4.

⁷⁶ *International Thunderbird v Mexico*, UNCITRAL (NAFTA), Thomas Wälde’s Separate Opinion (1 December 2005) [47].

⁷⁷ See *Arif v Moldova*, ICSID Case No ARB/11/23, Award (April 8, 2013).

⁷⁸ See *Electrabel v Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) [7.78]. See also *Continental v Argentina*, ICSID Case No ARB/03/9, Award (5 September 2008) [261]; *El Paso v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) [375]–[378].

⁷⁹ *Aguas del Tunari v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (21 October 2005) [52], [54], [63]–[65].

Something similar happened in the case of Chevron. The negotiations between the government of Ecuador and the foreign investor had large environmental implications for the local population. The government of Ecuador consented to and approved the inadequate remediation program carried out by Chevron without seriously considering the views of the local population.⁸⁰ However, this is not a problem for the investment tribunal. The arbitrators decided that Ecuador's consent is valid and encompasses the community interests protected by the constitution. They found that the only rights that escape the agreement are private individual rights.⁸¹

What is important here is that these two cases are not rare exceptions to the rule in foreign investment relations. A look at these relations confirms that multinational corporations and host states often gather in places with no cameras or participation of the population. While demonstrations appear on TV, foreign investors and host states may be negotiating in the shadows, and sometimes the contents of the dealings remain confidential.⁸² The recent fracking agreement between the government of Argentina and Chevron, for instance, has not been made public despite public pressure.⁸³ Local populations thus have severe limitations on how they can learn about the consequences of foreign investment decisions. This information imbalance, moreover, may not be just a coincidence, because some multinational corporations rely on these dynamics to deal with public outcry. For them, the key is detecting controversial issues as quickly as possible 'to prevent further escalation of the public discussion'.⁸⁴

International investment law has facilitated these dynamics since the late 1960s and 1970s. As suggested above, the role of public international law in the protection of foreign investors depends largely on the views of sovereignty. The decolonisation movement saw sovereignty as a means for the higher goal of self-determination. Sovereignty was meant to establish community values in territories that suffered long periods of foreign control. As Sornarajah explains, however, this notion of sovereignty was put into crisis by international investment law in the late 1960s and 1970s. Many arbitration tribunals found that, according to public international law, foreign investment contracts can

⁸⁰ Kimerling (n 18) 494–5, 498–9, 501, 503.

⁸¹ *Chevron v Ecuador*, UNCITRAL, PCA Case No 2009–23, First Partial Award on Track 1 (17 September 2013); *Chevron v Ecuador*, UNCITRAL, PCA Case No 2009–23, Decision on Track 1B (12 March 2015).

⁸² See International Institute for Sustainable Development, 'Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development' (2005) 1 *Sustainable Markets* 2, 2–4; Andrea Shemberg, 'Stabilization Clauses and Human Rights' (United Nations Special Representative of the Secretary-General on Business and Human Rights, 2008) 41.

⁸³ See Hugo Alconada Mon and Francisco Olivera, *La Nacion*, 'Chevron condicionó el acuerdo con YPF a la reforma de leyes clave', (9 November 2014), online: <www.lanacion.com.ar/1742479-chevron-condiciono-el-acuerdo-con-ypf-a-la-reforma-de-leyes-clave>; Ricardo Kirschbaum, *Clarín*, 'Capitanich defendió el acuerdo YPF-Chevron: "No hay cláusula secreta"', (10 November 2014), online: <www.clarin.com/politica/Jorge_Capitanich-YPF-Chevron-Frente_Renovador_0_1246075565.html>.

⁸⁴ Ulrich Steger, *Corporate Diplomacy: The Strategy for a Volatile, Fragmented Business* (Wiley, 2003) 131.

be internationalised.⁸⁵ The internationalisation of these contracts together with a strict interpretation of the principle of *pacta sunt servanda* meant that much of the long struggle for sovereignty could be lost with the stroke of a pen.⁸⁶

Twenty years later, the IIR and investment arbitration have not fixed this problem; rather, they have made it more acute. This regime promotes the doctrine of legitimate expectations, which hinders the right to participate in fundamental decisions for many populations around the world. Meanwhile, the rights foreign investors acquire can deprive people of other human rights, such as the right to water in Cochabamba or the right to a clean environment in Lago Agrio. As a result, it is likely that people will challenge these foreign investments in demonstrations and public acts. They did in Cochabamba, asking the government to take measures for the protection of the community. After the establishment of the foreign investment, however, it is often too late to act because foreign investor expectations may already be established and may require protection. At this point, foreign investors have two strategies to prevent host states from interfering with their investment.

First, they can threaten host states with an investment arbitration. This threat alone can be quite a powerful tool given the potential costs for host states in terms of reputation, the public financial burden of an investment arbitration and the leverage that the threat of a dispute may give to any local actor who shares similar interests with the foreign investor. For instance, there is evidence that Philip Morris's lobbying and the threat of arbitration had a chilling effect on the governments of Canada and the United Kingdom,⁸⁷ and that some countries have an explicit strategy to reach agreements to avoid arbitrations.⁸⁸ Second, as a last resort, foreign investors can file a request for arbitration and pursue the case before an investment tribunal. This is less a problem for foreign investors because they can place the financial burden of an arbitration on third-party funders.⁸⁹

In case the host state insists on taking the controversial measure, an investment tribunal may be inclined to find that such a government needs to compensate the foreign investor. Acting because of a social protest, like the one in Cochabamba, is likely to be interpreted as an arbitrary measure—based

⁸⁵ M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010), 13–4, 48–53.

⁸⁶ *Ibid*, 291; Anghie (n 48) 223–44.

⁸⁷ Physicians for a Smoke-Free Canada, 'The Plot Against Plain Packaging', (April 2008), online: <www.smoke-free.ca/pdf_1/plotagainstplainpackaging-apr1%27.pdf>; Jamie Doward, The Guardian, 'Revealed: tobacco giant's secret plans to see off plain cigarette packets', (27 July 2013), online: <www.theguardian.com/business/2013/jul/28/philip-morris-plain-packaging>.

⁸⁸ In the case of Colombia, see UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (United Nations Publishing, 2010) 80. Although there is no specific evidence, there are rumours of out-of-court settlements between the government of Colombia and foreign investors. The existence of these settlements would prove, once again, the lack of transparency in foreign investment relations.

⁸⁹ See Organisation for Economic Co-operation and Development (OECD), *Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012*, Investment Division, Directorate for Financial and Enterprise Affairs Paris (2012) 36.

on the reasoning that governments should act for regulatory and not political reasons.⁹⁰ But this legal position, one could argue, should only be valid after analysing the legitimacy of the foreign investment decision. This analysis is important because the actors who do not participate in the decisions are those who later may become most vulnerable. And a look at foreign investment relations shows that these are not foreign investors. Those who are vulnerable are the local populations of places like Cochabamba or Lago Agrio who have no voice in foreign investment decisions.

This vulnerability, in addition, becomes systemic in a world where states compete for foreign investment, and while doing so, make representations and promises to attract foreign investors. This may or may not be enough to create legitimate expectations, but are host states and local populations in a position to risk the environment or community values before an international investment tribunal?

4. Dealing with multiple expectations: can participation mechanisms help?

Recognizing the importance of local participation for the creation of foreign investor rights would not imply the existence of substantive expectations of host states or local populations. This view is not about a right of the local population to, for instance, a clean environment. The argument is rather that the use of local resources is fundamental to people's lives, and therefore local populations should have the means to participate in any meaningful decision about these resources. Their needs have to play an essential role in foreign investment decisions. Particularly, they should not be ignored or overlooked by a legal reasoning that focuses on the position and reliance of foreign investors only. Investment decisions are more than business calculations; they are value choices, such as whether or not, and how, to produce oil.⁹¹ It would therefore be unfair and inequitable to make these decisions behind the backs of local populations.

But this happens quite often, unfortunately, and the IIR contributes to this unfair result by recognizing and protecting substantive foreign investor expectations. Property is plural and incorporates many values, which local laws and judges may articulate in different ways. But a look at the IIR shows that this regime has little respect for the constellation of community values.⁹² The problem is not that foreign investors acquire entitlements (eg to produce oil). The issue is that the IIR and investment arbitrators intervene in foreign investment relations by embedding wealth maximisation as the main purpose for foreign investor rights. Accordingly, investment arbitrators

⁹⁰ See *TECMED v Mexico*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) [127], [128]; *Azurix v Argentina*, ICSID Case No ARB/01/12, Award (14 July 2006) [378]. The expected behaviour of a host state is described, for instance, in *Saluka v. the Czech Republic*, UNCITRAL, Partial Award (17 March 2006) [307].

⁹¹ Singer (n 26) 1299.

⁹² The IIR operates as a 'normatively closed but cognitively open' legal order. David Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?' (2011) 4 *Journal of International Dispute Settlement* 471, 494.

promote strong foreign investor rights by focusing on substantive—as opposed to procedural—expectations.⁹³ So it is no longer foreign investors who need to adapt to the locality, but the local population that must adapt to the rationality imposed by the foreign investment decision, whether it is the rationality of private water supply or of oil drilling and lifting.

A common argument against the criticism I am making here is that the problem, in fact, lies in domestic institutions and governments. The lack of people's participation in Cochabamba or Lago Agrio would be the exclusive result, in this argument, of the deficient institutions in Bolivia and Ecuador. It is indisputable that the institutions in Ecuador and Bolivia can be improved, as can the institutions in Global North countries. But this does not invalidate the claim that the IIR contributes to weakening democracy around the world.⁹⁴ It has been argued that the IIR deals with the lack of good institutions in host countries;⁹⁵ however, this claim seems to be limited to the respect of foreign investor property and contract rights. Precisely because property is relational, the excessive respect of some rights may come at the detriment of others.

This scenario has produced different reactions at the local and international level. Many governments remain unmoved by the risks that foreign investor rights, as specified by investment arbitrators, pose for local populations. Rather, they ensure that the requirements to create foreign investor rights remain low, when they are not simply repealing them. An initiative in Egypt, for instance, limits judicial challenges of foreign investment decisions to minimise state liability and favour foreign investor calculability.⁹⁶ A number of foreign investment decisions were judicially challenged in Egypt, bringing about uncertainty for foreign investors. The solution was to limit the ability of the local population to participate by challenging foreign investment decisions. Part of the media sees this as a salutary move because it would limit state international liability. These commentators, again, overlook democratic principles and human rights.⁹⁷ They are not worried that foreign investors can gain control of key resources through simple administrative channels, despite this being a fundamental decision for the population.

⁹³ Procedural legitimate expectations rest on the presumption that a public authority will follow a certain procedure to make a decision, while substantive legitimate expectations arise when an authority makes a lawful representation that an individual is entitled to a right or benefit. See Christopher Forsyth, 'Legitimate Expectations Revisited' (2011) 16 *Judicial Review* 429.

⁹⁴ See Chimni, (n 14) 22.

⁹⁵ For a discussion of this argument, see Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 *International Review of Law and Economics* 107.

⁹⁶ Noha Moustafa, Al-Ahram Weekly, 'Amendments to the investment law', (10 April 2014), online: <<http://weekly.ahram.org.eg/News/5618/18/Amendments-to-the-investment-law.aspx>>; Al Arabiya News, 'Egypt investment law prohibits challenge to government contracts', (24 February 2014), online: <<http://english.alarabiya.net/en/business/economy/2014/02/24/Egypt-investment-law-prohibits-third-party-challenge-to-contracts-source-says.html>>.

⁹⁷ Some organisations in Egypt have criticised the new law because it 'protects' corruption, see Daily News Egypt, 'Appeal against new Investment Law begins on Sunday', (11 October 2014), online: <www.dailynewsegypt.com/2014/10/11/appeal-new-investment-law-begins-sunday/>.

In Latin America, on the contrary, some countries have reacted by implementing constitutional requirements to consult indigenous groups before the establishment of a foreign investment in their land.⁹⁸ In general, however, the implementation of this right of prior consultation still faces several challenges. The main one is that the process of prior consultation often depends on host states and, paradoxically, on foreign investors.⁹⁹ This is a major problem because host states often need to attract foreign investment to promote growth and increase revenues, while foreign investors are interested in profit opportunities and not in local aspirations. In the case of Ecuador, for instance, the right of prior consultation is established in the constitution, but the evidence shows that it has not been adequately applied in practice. The Inter-American Court of Human Rights has condemned Ecuador for the violation of the right of prior consultation in the *Sarayaku* case.¹⁰⁰

At the international level, there are also important developments related to indigenous land rights and prior consultation. International treaties are increasingly demanding that states obtain the free, prior and informed consent (FPIC) before they transfer any right over indigenous land to private parties, including foreign investors.¹⁰¹ When analysing the difficulties in implementing FPIC, the literature highlights two elements. First, states often promote the use of indigenous land for economic activities like mining and agribusiness.¹⁰² Second, there are difficulties implementing FPIC because of the different normative contexts. Normally, indigenous groups have a communal understanding of property that clashes with private property. This makes it difficult to determine when there is consent; among other issues, it raises the question of whether or not the people have full knowledge and appreciation of the situation. Some authors, for this reason, suggest that it is necessary to involve anthropologists in the FPIC process.¹⁰³

As the literature on FPIC suggests, international law and institutions can promote broader local participation in foreign investment decisions. International law could serve to protect the voice of local populations when states are focused on attracting foreign investment. For instance, the implementation of prior consultation may be a good tool for any foreign investment with a large

⁹⁸ See Due Process of Law Foundation, *El derecho a la consulta previa, libre e informada de los pueblos indígenas: la situación de Bolivia, Colombia, Ecuador y Perú* (2009).

⁹⁹ See Yadira Castillo Meneses, 'El rol de la empresa transnacional extractiva de petróleo en la consulta previa con las comunidades indígenas: La experiencia en Colombia' (2012) 37 *Revista de Derecho*, Barranquilla 1.

¹⁰⁰ *Pueblo Indígena Kichwa de Sarayaku v Ecuador*, IACHR, Decision (27 June 2012).

¹⁰¹ Sprankling (n 20) 331–2.

¹⁰² Sarah Sargent, 'What's in a Name: The Contested Meaning of Free, Prior and Informed Consent in International Financial Law and Indigenous Rights' in Valentina Vadi and Bruno de Witte (eds), *Culture and International Economic Law* 87 (Routledge, 2015), 87–8; Jayantha Perera, 'Old Wine in New Bottles: Self-determination, Participatory Democracy and Free, Prior and Informed Consent' in Paul Sillitoe (ed) *Indigenous Studies and Engaged Anthropology: The Collaborative Moment* 147 (Routledge, 2015), 151.

¹⁰³ *Ibid.*, 158–61.

social impact, and not only for projects related to indigenous land rights.¹⁰⁴ These consultations could lead to conservation contracts.¹⁰⁵ Medium and small projects, on the other hand, may require considering simpler mechanisms.

But establishing an international regime capable to give local populations a meaningful role in foreign investment governance —ie a regime beyond investment protection and arbitration— would demand a large institutional reform. In the meantime, investment tribunals have the possibility to shape the applicable rules to foreign investment relations. As an arbitrator stated in a dissenting opinion, nowhere in investment treaties are tribunals required to apply the doctrine of legitimate expectations.¹⁰⁶ The one-sided application of the reliance reasoning is a way to intervene in foreign investment relations in favour of foreign investors. This means that arbitrators could also intervene in favour of local populations by implementing stricter rules for the creation of foreign investor rights.

Conclusions

Supporters argue that the IIR is justified because foreign investors do not vote or participate in domestic political decisions. Corporations the size of Bechtel or Chevron, however, never invest without discussing directly with host governments the conditions of their projects and the contents of their rights. In these discussions, the actors who rarely participate are local populations.

Against this background, the IIR strengthens the bargaining positions of foreign investors and their resulting rights as a means to facilitate wealth maximisation through foreign investment. This regime intervenes in foreign investment relations by interpreting the results of investment decisions, ie the scope of foreign investor rights. This article has focused on how investment tribunals privilege the trust and calculability of foreign investors over the participation of local actors directly affected by foreign investment decisions. Arbitrators rely on a reliance-based reasoning to specify foreign investor expectations based on explicit or implicit host state representations—including *ultra vires* acts. The core of this reasoning is not state intention but foreign investor expectations. At no time have arbitrators apparently noticed that this interpretative technique disregards not only the intentions of host governments, but also the possibility of local participation in these fundamental decisions.

As a result, many people around the world have little or no say in foreign investment decisions with respect to key local resources. These decisions can affect not only domestic private rights but also community values. Here is where some proposals to fix the IIR fail to grasp the complexity of the

¹⁰⁴ For an optimistic view of the possibilities offered by a democratic type of governance property, see Gregory Alexander, 'Governance Property' (2011) 160:7 *University of Pennsylvania Law Review* 1853.

¹⁰⁵ See Natasha Affolder, 'Transnational Conservation Contracts' (2012) 25:2 *Leiden Journal of International Law* 443.

¹⁰⁶ *Suez and others v Argentina*, ICSID Case No ARB/03/17, Separate Opinion of Pedro Nikken, (30 July 2010) [2]–[4], [19], [25].

problem. From a holistic perspective, the IIR emerges as a site of social struggle that exceeds foreign investor rights and the host state's regulatory authority. Choices about the allocation and use of resources imply value decisions and these decisions can jeopardise local populations.

In this light, this article concludes with an appeal to think differently about foreign investment governance, both at the institutional and legal levels. Arguably, there is a need for an international regime to govern foreign investment, but this regime should go beyond investment protection and arbitration. There is, in this respect, increasing consensus that people should engage with the IIR.¹⁰⁷ Prior consultation and FPIC could arguably be expanded to every foreign investment with a large social impact. These mechanisms, however, may be inadequate in the case of medium and small projects. Investment tribunals can also contribute to this transformation by reconsidering the use of doctrines such as legitimate expectations and by starting to view foreign investor rights through the principles of equality and participation.

Enabling local participation in foreign investment decisions, however, should not be seen as a panacea for the protection of the plurality of community values. Democratic mechanisms are not necessarily a means to plurality.¹⁰⁸ Participation may help to protect community values around the world, but we should not expect that participation would solve all the problems. It is likely that many populations will say yes to foreign investments that could prove devastating for their rights and community values because of the need for jobs and economic growth. For this reason, it is necessary to think through how foreign investors could adapt more to local populations. The interaction and balance of different values in property remain fundamental challenges of our social organization, particularly, in times where economic growth continues to be the main preoccupation of most private and public actors.

¹⁰⁷ See Lorenzo Cotula, 'Democratising international investment law: Recent trends and lessons from experience' International Institute for Environment and Development (2015).

¹⁰⁸ Di Robilant (n 38) 343–6.